IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-573

RICHARD KAVNER,
Petitioner,

vs.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION, LHI-688 EMPLOYEES RETIREMENT AND PENSION PLAN TRUST, PHILIP L. GOODWILLING, LEVI SANFORD, ERNST NEIDEL, PAUL AKERS, RONALD GAMACHE, MICHAEL DUNN, KENNETH CARROLL, JAMES JOINER, CHICK THORNTON and JOHN BECKER,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS OTHER THAN OCCIDENTAL LIFE INSURANCE COMPANY

HARRY H. CRAIG
7 North 7th Street, Suite 717
St. Louis, Missouri 63101
(314) 231-1018
Attorney for Respondents Other Than Occidental Life Insurance Company of California

Of Counsel:
NORMAN W. ARMBRUSTER
CLYDE E. CRAIG
WILEY, CRAIG, ARMBRUSTER, WILBURN & MILLS

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

Authorities Cited

Cases:

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-573

RICHARD KAVNER,
Petitioner,

vs.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION, LHI-688 EMPLOYEES RETIREMENT AND PENSION PLAN TRUST, PHILIP L. GOODWILLING, LEVI SANFORD, ERNST NEIDEL, PAUL AKERS, RONALD GAMACHE, MICHAEL DUNN, KENNETH CARROLL, JAMES JOINER, CHICK THORNTON and JOHN BECKER,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS OTHER THAN OCCIDENTAL LIFE INSURANCE COMPANY

Respondents other than Occidental Life Insurance Company pray that the Petition for a Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit is reported at 602 F.2d 1265. The unreported opinion and judgment of the United States District Court for the Eastern Division of the Eastern District of Missouri is reprinted as Appendix "A" to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 1, 1979. A petition for rehearing and a suggestion for rehearing en banc timely filed was denied by the Court of Appeals on July 9, 1979. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Trustees to terminate Petitioner's pension benefits because of a break in service under the terms of the plan is contrary to established principles of law or the law of the State of Missouri.

2. Whether the decision of the Court of Appeals is in conflict with established principles of law in holding:

A. That the Trustees properly refused to accept an oral leave of absence to avoid a break in service for benefit eligibility and accrual, when under the specific terms of the plan a written leave of absence was required for that purpose;

B. That the Trustees' application of the break in service provisions of the plan was consistent, and there was no evidence of discrimination; reasonable or unreasonable, between employees who obtained written leaves of absence and those who did not before the pension plan existed;

C. That the Trustees' interpretation of the break in service provisions of the plan was not arbitrary, capricious or unreasonable;

D. By implication that the Trustees are legally entitled to recover pension benefits paid to Petitioner.

3. Whether the decision of the Court of Appeals is contrary to established principles of law or the law of the State of Missouri in holding that Occidental is not obligated to Petitioner on its contractual guarantee.

4. Whether Petioner forfeited all rights to pension benefits because he perpetrated a fraud on the Trust and Plan with regard to the years of credited service to which he was entitled.

5. Whether Petitioner forfeited all rights to pension benefits because his purported retirement was fraudulent.

6. Whether Petitioner failed to meet minimum eligibility requirements for pension benefits.

7. Whether the decision below turns upon its own unique facts and is unlikely to affect a substantial number of other litigants.

STATEMENT OF THE CASE

Harold Gibbons, one of the plaintiffs below, was first employed by an organization known as the American Federation of Teachers in Chicago in the early 1930's. In 1936 he became the Assistant Director of the CIO in Chicago. From 1937 until 1940 Gibbons was Subregional Director of the Textile Workers Union in Louisville, Kentucky. In 1940 he was assigned by the Textile Workers to work in Kansas City, Missouri. In 1941 Gibbons was hired as the Chief Executive Officer of the St. Louis Joint Board of International Retail, Wholesale and Department Store Employees Union, an Organization affiliated with the CIO. In 1948 Gibbons was instrumental in disaffiliating the St. Louis Joint Board from the International Retail, Wholesale and Department Store Employees Union, and continued the St. Louis Joint Board as an independent organization until 1949 when the Joint Board merged with Teamsters Local

688. (A.[1] 155-156) Prior to the merger in 1949, the St. Louis Joint Board was an organization consisting of various local unions, and had no connection or affiliation with the International Brotherhood of Teamsters which was an organization affiliated with the AFL. (A. 74, 75-76, 156) Teamsters Local 688 preexisted the merger, and was an organization totally separate and distinct from the St. Louis Joint Board. (A. 78-79) Thus, Gibbons' first employment by Teamsters Local 688 was in 1949. (A. 142, 156)

Kavner, the Petitioner herein, was employed by the International Retail, Wholesale and Department Store Employees Union, CIO in the eastern part of the country from 1939 until 1942 when he entered the armed services. In 1946 Kavner returned from service and was reemployed by the same organization and assigned to work in New York for a short period of time. In the latter part of 1946, Kavner was assigned by the International Union to St. Louis; ostensibly for the purpose of assisting Gibbons in the operation of the St. Louis Joint Board, but in reality for the purpose of undermining Gibbons' authority. Kavner transferred his loyalty to Gibbons and remained in St. Louis until the merger in 1949, at which time he too was first employed by Local 688. (A. 36-38, 74-80, 112-113)

From February, 1954 until January, 1955, Kavner was assigned to work on a special organizing program with the Missouri-Kansas Conference of Teamsters. (A. 38-41) At the time of this assignment, Kavner obtained a written leave of absence. (A. 83-84) From February, 1955 until February, 1958 Kavner was assigned to work as a "trouble shooter" for the Central Conference of Teamsters. Gibbons orally agreed at the time of that assignment that Kavner would be on a leave of absence. (A. 41-42, 84-87)

---

[1] "A" herein refers to the printed appendix filed with the Court of Appeals.

From March, 1958 through December, 1963, Kavner was employed by the International Brotherhood of Teamsters as a General Organizer. His salary, expenses and fringe benefits were paid solely by the International Union during this period of time, and not by Local 688. Although he may have performed some services for Local 688 while on this assignment, the vast majority of his actual working time was spent in performing his duties as General Organizer. Unquestionably, he was not a full time employee of Local 688 at this time, and he did not have a written leave of absence. (A. 88-89, 109-110, 156-157, 159-160, 344-348, 360-362, 387-388, 403, 431)

Prior to 1968 Gibbons, who was after the merger the chief executive officer of Local 688, instructed Kavner, his top assistant, to establish the LHI-688 Pension Plan. The basic provision of the Plans[2] were devised under Kavner's direct supervision with the assistance of various consultants and attorneys. From the adoption of the Trust and Plans in 1968 until March, 1971, the Plans were administered by the Trustees as self insured plans. In late 1969 or early 1970, Kavner, again acting on instructions from Gibbons, entered into negotiations with Occidental Life Insurance Company of California (Occidental). Gibbons and Kavner had two basic objectives in mind: (1) to provide increased benefits for employees of Local 688, including themselves; and (2) to obtain "guarantees" of pension benefits from Occidental for certain employees of Local 688, including themselves. Neither increased benefits nor "guarantees" for employees of LHI was ever discussed or con-

---

[2] The Trust Agreement provided that the employers (St. Louis Labor Health Institute [LHI] and Local 688) desired common administration of their respective retirement plans for reasons of "convenience and economy;" but it was clearly provided in the Trust Agreement that ther would be two separate and distinct plans: Plan A for LHI employees and Plan B for Local 688 employees. (A. 246, 317-319, 321-322, 459) Kavner served as a Trustee of the Fund from its inception in 1968 until December 31, 1971. (A. 47, 69)

sidered. The employees of Local 688 for whom the "guarantees" were to apply were listed on Exhibit B to the Group Annuity Contract which was entered into with Occidental. At Kavner's request, Philip Goodwillng supplied initial employment dates of employees of Local 688 who eventually were listed on Exhibit B. The employment date of Gibbons which was furnished to Kavner was July, 1941, and Kavner's employment date was February 2, 1953, all of which information had been taken from their personnel files kept at the Union office. Kavner changed Gibbons' employment date to July 1, 1938, and changed his own employment date to November 1, 1939. Kavner kept Gibbons advised during his negotiations with Occidental. Those negotiations were concluded on March 18, 1971 when the Trustees executed the Group Annuity Contract and adopted amended Plans A and B retroactive to January 1, 1968. (A. 45-65, 68-73, 89-91, 111, 157, 349-350, 353, 362-368, 435-445)

It was always provided that the provisions of Plan B would only apply to regular full-time employees of Local 688 who were employed a minimum of 35 hours per week. (Appendix [3] C, Art. 1, §1.7) Credit for service prior to the effective date of Plan B was also calculated on the basis of full-time employment with Local 688. (Appendix C, Art. 1, §1.11[4]) There never was any provision for covering participants or crediting service on the basis of employment by any other employer. (Appendix A, preamble; Appendix B, Art. I, §§2), 7), 8), 9), 10); Art. III, §2); Appendix C, Art. 1, §§1.3, 1.7, 1.10, 1.11)

---

[3] "Appendix" herein refers to the Appendix to this Brief in Opposition. Because of the number of exhibits, not all exhibits were reprinted as part of the Appendix in the Court of Appeals. For the convenience of this Court, the Agreement and Declaration of Trust is reprinted as "Appendix A" to this Brief, the original Plan B is reprinted as "Appendix B," and Plans A and B as amended on March 18, 1971 (effective January 1, 1968) are reprinted as "Appendix C."

[4] Plan A provided for part-time employees, but Plan B did not. (Appendix C, Art. 1, §§1.7, 1.8)

Gibbons and Kavner claimed service dates from 1938 and 1939 respectively on the basis of the 1949 merger of the St. Louis Joint Board with Local 688. (A. 109) Both Gibbons and Kavner were aware that they were claiming credited service, in part, based upon employment by employers other than Local 688 (A. 251-252), and both of them were familiar with the basic terms of the plan. (A. 46-65, 157)

The plan provided that an employee's credited service would be broken if he leaves the service of the employer for a period of at least fifty-two consecutive weeks, unless the employee has been granted a leave of absence in writing or was in the armed forces of the United States. (Appendix C, Art. 1, §1.11(d)) Kavner was well aware of the break in service provisions of the plan, including the requirement that to avoid a break in service by reason of a leave of absence the leave of absence must be in writing. (A. 96)

Kavner was employed by Local 688 as Gibbons' principal administrative assistant. As such he exercised broad, comprehensive administrative functions under Gibbons' direction. (A. 82-83, 148, 333) After his purported retirement on December 31, 1971, Kavner performed virtually the same duties and exercised the same authority as had been the case prior to his retirement. (A. 97-103, 164-165, 333-339, 358-360, 403-405, 431-432)

At the time of his retirement, Kavner's salary was approximately $20,000 annually. (A. 103) After he retired, Kavner's income from various sources was in excess of $60,000 annually. (A. 104-109)

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Decision of the Trustees to Terminate Petitioner's Pension Benefits Because of a Break in Service Under the Terms of the Plan is not Contrary to Established Principles of Law or the Law of the State of Missouri.

It is important to keep in mind the fundamental fact that Kavner was intimately aware of the basic terms of the Plan since he had personally negotiated them. (A. 44-65, 68-73, 157) Specifically, Kavner was familiar with the break in service provisions of the Plan. (A. 96) In response to a specific inquiry on this subject, the Plan's consultant, Remshardt, advised Petitioner by a letter dated September 28, 1971[5] that in order to avoid a break in service a leave of absence must be "authorized *in writing* by the Employer." (DOO Ex. TTT[6], emphasis supplied)

Clearly, Petitioner was not employed by Local 688 from March, 1958 through December, 1963 when he was employed by the International Brotherhood of Teamsters as a General Organizer, and he did not have a written leave of absence from Local 688. (A. 88, 109-110, 156-157, 159-161, 344-348, 360-362, 387-388, 403, 431) Under the clear terms of the Plan, in order to avoid a break in service a leave of absence must be in writing. (Appendix C, Art. 1, §1.11(d) (1))) Petitioner argues that this requirement is contrary to established law. The authorities cited by him, however, do not support this conclusion.

---

[5] Three months prior to Petitioner's retirement.

[6] Attached hereto as Appendix D. "DOO" refers to "Defendants Other Than Occidental", the customary designation of these Respondents below.

Chemical Workers Local 1 v. *Pittsburgh Plate Glass Company,* 404 U.S. 157 (1971) involved the question whether it was an unfair labor practice for an employer to alter health insurance benefits for retirees unilaterally without bargaining with a union which represented the active employees. The comment in footnote 20 at page 181 of the Court's decision ("Under established contract principles, vested retirement rights may not be altered without the pensioner's consent.") is not determinative of the question presented herein because it presupposes, by use of the term "vested", that the pensioner has satisfied all requisite eligibility requirements. This conclusion is fortified by reason of the fact that the Court cites Note, 70 Col. L. Rev. (1970) as authority for the proposition quoted. That Note observes in analyzing the National Labor Relations Board's decision in the *Pittsburgh Plate Glass* case (177 NLRB No. 144) that it "is not itself a pension plan case." *Id.,* at 911. It is also noted that "it is the administrative board [Trustees] which is given the power to determine whether any individual is entitled to benefits under the plan. It must determine whether employees have vested rights under a plan, it approves applications for early retirement, and it supervises benefits payments to the retiree *who has fulfilled all requirements.*" *Id.,* at 909 (emphasis supplied) "*Upon complete fulfullment of plan requirements,* rights are completely vested." *Id.,* at 910 (emphasis supplied) Of course, the point here is that Petitioner had not fulfilled all Plan requirements because his break in service left him without the requisite 20 years of credited service to be eligible for pension benefits. (Appendix C. Art. 3, §3.1(b))

Molumby v. *Shapleigh Hardware Company,* 395 S.W.2d 221 (Mo. App. 1965), also cited by Petitioner, was a case where an employer ceased funding a unilateral, non-contributory pension plan. The St. Louis Court of Appeals noted (at page 227) as follows:

> "We have no quarrel with the theory that 'once an employee who has accepted employment under such plan, *has complied with all the conditions entitling him to participate in such plan,* his rights become vested and the employer cannot divest the employee of his rights thereunder.' However, in the instant case, plaintiffs ignore the fact that they have not complied with all conditions entitling them to participate in the Plan." (emphasis supplied)

Again, the question of vesting depends entirely on meeting all eligibility requirements which Petitioner has failed to do. Similarly, *Feinberg* v. *Pfeiffer Company,* 322 S.W.2d 163 (Mo. App. 1959) held that an employer was precluded by reason of promissory estoppel from discontinuing pension benefits for a retiree who had fulfilled all conditions for receiving the benefits.

Petitioner cites a number of decisions of the United States Court of Appeals for the District of Columbia which are likewise inapplicable. *Norton* v. *I.A.M. National Pension Fund,* 553 F.2d 1352 (D.C. Cir. 1977) involved denial of pension benefits by reason of a forfeiture provision adopted after the employee had satisfied all requirements for vesting but before he had applied for pension benefits. The Court of Appeals held that the forfeiture provision was unreasonable in that it was not rationally related to any legitimate purpose of the plan, and the application of the forfeiture provision was arbitrary and capricious under the facts of the case because the applicant had satisfied all preconditions for vesting prior to its adoption. *Lavella* v. *Boyle,* 444 F.2d 910 (D.C. Cir. 1971) held that it was arbitrary for trustees to deny pension benefits to an applicant who would have qualified under earlier industry service eligibility requirements, but did not qualify under more restrictve requirements adopted subsequently. *Kosty* v. *Lewis,* 319 F.2d 744 (D.C. Cir. 1963) also held that trustees arbitrarily denied pension benefits by reason of an eligibility requirement relating to industry service adopted after the applicant had met

the conditions of an earlier requirement. *Danti* v. *Lewis,* 312 F.2d 345 (D.C. Cir. 1962) held that it was arbitrary to deny benefits because of an industry service eligibility requirement adopted after the application for benefits was filed, where the applicant met the requirement in effect at the time the application was filed. *Lee* v. *Nesbitt,* 453 F.2d 1309 (9th Cir. 1972), also cited by Petitioner, held that it was unreasonable to apply a break in service provision to deny benefits when the applicant had satisfied all eligibility requirements in effect before the break in service occurred.

All of these cases are premised on the factual basis that the employee at some time met eligibility requirements in effect before a forfeiture provision was adopted. Of course, Petitioner is not in that position because the break in service provision in effect at the time of the original plan (Appendix B, Art. I, §11)) remained unchanged after Petitioner negotiated the amended plan with Occidental (Appendix C, Art 1, §1.11), and still was in effect at the time of his retirement. (Appendix D) The simple fact of the matter is he *never* satisfied the Plan's eligibility requirements.

Contrary to Petitioner's contention, break in service forfeiture provisions have received judicial approval and are recognized as valid. *Thurber* v. *Western Conference of Teamsters Pension Plan,* 542 F.2d 1106 (9th Cir. 1976); *Phillips* v. *Kennedy,* 542 F.2d 52 (8th Cir. 1976); *Hodgins* v. *Central States Pension Fund,* ____ F. Supp. ____, 81 LC par. 13,076 (E.D. Mich. 1976)

Petitioner argues that since his pension was originally approved, it cannot thereafter be terminated regardless of whether or not he was eligible. Of course, Kavner was a Trustee at the time his pension application was filed, and he had served in that capacity from the inception of the Plan in 1968. (A. 69) When the Trustees reviewed the facts in 1975 it became apparent that the initial approval of Kavner's pension had been erroneous

(Plaintiffs' Ex. 8, A. 461). The only proper thing for them to do at that point, consistent with their fiduciary obligations, was to terminate Kavner's pension benefits.[7] Contrary to Petitioner's contentions, the decision of the Court of Appeals will not be detrimental to future retirees who have complied with all eligibility requirements. It will be a distinct benefit to this and other pension plans by insuring that conditions for eligibility be properly enforced.

II. The Decision of the Court of Appeals is Not in Conflict With Established Principles of Law in Holding:

A. That the Trustees Properly Refused to Accept an Oral Leave of Absence to Avoid a Break in Service for Benefit Eligibility and Accural, When Under the Specific Terms of the Plan a Written Leave of Absence Was Required for That Purpose;

B. That the Trustees' Application of the Break in Service Provisions of the Plan Was Consistent, and There Was No Evidence of Discrimination, Reasonable or Unreasonable, Between Employees Who Obtained Written Leaves of Absence and Those Who Did Not Before the Pension Plan Existed;

C. That the Trustee's Interpretation of the Break in Service Provisions of the Plan Was Not Arbitrary, Capricious or Unreasonable;

D. By Implication That the Trustees are Legally Entitled to Recover Pension Benefits Paid to Petitioner.

A. At all times, the Plan by its clear terms required that a leave of absence must be in writing to avoid a break in service.

---

[7] Petitioner's flights of fancy that Gibbons "was deposed ('resigned')" as the result of a "palace revolt" in 1973 (Pet. Pg. 14) is simply not supported in the record. (A. 406-407, 420)

This was the requirement when the plan was first adopted in 1968, it remained a requirement during all the time Kavner served as Trustee of the plan, it remained unchanged after Kavner negotiated the new plan with Occidental, and the identical requirement was in effect on December 31, 1971 when Kavner retired. (Appendix B, Art. I, §11; Appendix C, Art. 1, §1.11) Kavner, of course, was fully aware of this requirement. (A. 96; Appendix D)

On what possible basis, therefore, can Petitioner urge that the Court of Appeals should have required the Trustees to ignore the requirement that a leave of absence be in writing, and require them to accept an oral leave of absence contrary to the express terms of the Plan? Petitioner advances absolutely no factual basis or legal authority to support this result; and indeed none exists. Contrary to his argument where he urges that crediting service with an employer other than Local 688 should be read *into* the Plan's provisions, he is asking in that instance that clearly expressed Plan requirements be read *out* of the Plan. This the Court of Appeals properly refused to do.

B. Employees other than Kavner who left the service of Local 688 without a written leave of absence were held to have suffered a break in service, including employees who requested a written leave of absence but whose requests were denied. (A. 348-349, 390,407) There was no evidence that anyone was granted a written leave of absence in the past, other than Kavner. (A. 83-84) Thus, there is absolutely no basis for saying that employees were treated in a discriminatory manner in any respect. The evidence reveals consistent interpretation of the break in service provisions in precisely the same manner they were applied to Kavner. As the Court of Appeals properly found, "since other employees suffered breaks in service upon receiving transfers to other Teamster organizations, allowing Kavner to utilize an oral leave of absence would violate the plan's requirement of uniform and consistent application." (App. to Kavner's Petition for Certiorari, p. A-38).

C. It cannot be gainsaid that the approval of Kavner's pension by the Trustees when Kavner was one of those Trustees was erroneous. But when errors are discovered, it is incumbent on the Trustees to correct those errors. (A. 461) It is not embarrassing for the Trustees to admit to this Court that Kavner's pension should never have been granted. It would be most embarrassing, however, had they not taken the necessary steps to see that this error was properly corrected. Petitioner's argument that once a pension has been approved and payments made, those benefits are not subject to cancellation for any reason, is simply not the law. *Retail Clerks* v. *Burge,* ____ F. Supp. ____, 87 LC Par. 11,640 (D.C.D.C. 1979); *Steelworkers* v. *Crane Co.,* 605 F.2d 714 (3rd Cir. 1979)

D. It is interesting to note that after the decision of the Court of Appeals, Petitioner urged the District Court to deny recovery against him. Of course, his position before this Court is that recovery is the logical consequence of the decision of the Court of Appeals, as indeed it is.

There certainly would not be anything surprising in a finding by the District Court that Petitioner is required to repay pension benefits which he was not entitled to receive. That matter, however, is still before the District Court and is not ripe for review here.

III. The Decision of the Court of Appeals Is Not Contrary to Established Principles of Law or the Law of the State of Missouri in Holding That Occidental Is Not Obligated to Petitioner on Its Contractual Guarantee.

The extent of Occidental's obligations on its guarantee, and otherwise, is, of course, the subject of a separate Petition for a Writ of Certiorari pending before this Court in No. 79-568.

Suffice it to say here that Occidental's guarantee extended "to all benefits which shall become payable under the Plan." (A. 448) Since Petitioner was not entitled to benefits under the

terms of the Plan, it follows that Occidental's guarantee did not extend to him.

IV. Petitioner Forfeited All Rights to Pension Benefits Because He Perpetrated A Fraud on the Trust and Plan With Regard to the Years Of Credited Service to Which He Was Entitled.

Apart from the question of Petitioner's break in service, the Court of Appeals found that Petitioner was guilty of fraud in claiming credited service for employment with employers other than Local 688. (See page 36 of the Appendix attached to the Petition) This fraud disqualifies him from claiming pension benefits.

Kavner was aware that he was claiming credited service, in part, based upon employers other than Local 688 (A. 108, 251-252); and he, of course, was familiar with the basic terms of the Plan. (A. 45-65, 68-73, 157) A specific Plan provision in effect at the time Kavner retired permitted forfeiture of benefits for any misrepresentation by an applicant, including recovery of benefits paid in reliance on such misrepresentation. (Appendix C, Art. 9, §9.8)

It was always provided that the Plan would only apply to regular full-time employees of Local 688 who were employed for not less than 35 hours per week. (Appendix C, Art. 1 §1.7) Credit of service prior to the effective date of the Plan was also calculated on the basis of full-time employment by Local 688. (Appendix C, Art. 1, §1.11) There never was any provision for covering participants or crediting service on the basis of employment by any other employer. (Appendix B, Art I, §§7), 8), 9), 10); Art. III, §2); Appendix C, Art. 1, §§1.3, 1.7, 1.11)

Kavner claimed credited service from 1939, fully 10 years prior to his first employment by Local 688. This fraud constitutes an independant ground for terminating his pension benefits.

V. Petitioner Forfeited All Rights to Pension Benefits Because His Purported Retirement Was Fraudulent.

Another independent basis which supports the judgment of the Court of Appeals is that Kavner's retirement was pretextual.

Kavner was Gibbons' chief administrative assistant. As such, he exercised extensive power within Local 688. Next to Gibbons, no one in Local 688 had more authority than Kavner. (A. 80-83, 148, 333, 358-359)

Apparently, Kavner did not want to relinquish that power; but he was motivated to pretend to retire by the simple economic fact that he was thereby able to increase his income from approximately $20,000.00 annually (A. 103) to more than $63,000.00 annually. (A. 104-109) Obviously, this was a strong incentive to "retire".

Kavner announced his retirement as of December 31, 1971.[8] However, he continued thereafter to exercise his authority and duties with virtually no change. (A. 97-103, 164-165, 333-344, 358-360, 403-405, 431-432) Obviously, this depleted the assets of the Plan and constituted a fraud on the Trust and the Plan, by reason of which Petitioner has forfeited all rights to pension benefits. *Mendise* v. *Central States Pension Fund,* ____ F. Supp. ____, 80 LC par. 11,887 (N.D. Ohio 1975)

---

[8] This was less than ten months after Amended Plan B was adopted, increasing the maximum pension from $300,00 for 60 months and $110.00 per month thereafter to a maximum of $40.00 multiplied by years of Credited Service up to 30 or $1,200.00. Kavner applied for and was granted a $1,200.00 per month pension. (App. to Plaintiff Kavner's Petition for Certiorari, p. A-14).

VI. Petitioner Failed to Meet Minimum Eligibility Requirements for Pension Benefits.

Even under a properly authorized leave of absence, a participant does not accumulate credited service during periods of absence from the employ of Local 688. Accumulation of credited service under the Plan requires continuous full-time service with the Employer (Local 688). (Appendix C, Art. 1, §§ 1.3, 1.7, 1.11) Thus, even if an employee does not incur a break in service by reason of employment with another employer, he does not accumulate credited service by reason of such employment. The Plan appropriately speaks in terms of years of credited service "completed" by the participant when it sets forth the manner in which retirement benefits are to be computed. (Appendix C, Art. 4, §§ 4.3, 4.5; Art. 5, § 5.3)

At the time of Kavner's retirement, a minimum of 20 years of credited service was required. (Appendix C, Art. 3, § 3.2) From the time of Kavner's initial employment by Local 688 in 1949 until his retirement on December 31, 1971 (a total of 23 years), he accumulated credited service of only 13 years and 4 months, far below the minimum required for eligibility. This conclusion is derived from the following analysis:

Kavner was assigned to work on a special organizing program with the Misouri-Kansas Conference of Teamsters from February, 1954 until January, 1955 (11 months). (A. 38-41, 83-84) He worked as a "trouble shooter" for the Central Conference of Teamsters from February, 1955 until February, 1958 (3 years or 36 months). (A. 41, 85-87) From March, 1958 through December, 1963 (5 years and 9 months or 69 months) Kavner was employed by the International Brotherhood of Teamsters as a General Organizater. (A. 88-89, 109-110, 156-157, 159-160, 344-348, 360-362, 387-388, 403, 431) Thus, from 1949 through 1971, Kavner was employed elsewhere for a

total of 116 months or 9 years and 8 months. Clearly, he did not have sufficient credited service to be eligible for a pension at the time of his retirement.

VII. The Decision Below Turns On Its Own Unique Facts and Is Unlikely to Affect a Substantial Number of Other Litigants.

This case is unique to itself. The facts of the case frame the issues, and those facts and issues are not likely to appear in a substantial number of other situations. Occidental's contractual guarantee, for example, is a most unusual contractual undertaking for an insurance carrier. (A. 254-255)

This Court's time and energies must be reserved for cases of broad national significance which involve important constitutional and statutory issues. The issues raised by this Petition are of limited significance, and resolution depends in large part on decisions of lower federal courts which have established uniform and consistent guidelines, and, to some extent, on state law. Even the comprehensive federal statute regulating pensions (ERISA, 29 U.S.C. § 1001 et seq.) is inapplicable because it was not enacted until 1974, long after Petitioner retired. **Steelworkers** v. **Crane Co.**, supra. Petitioner's rights, if any, are largely common law rights which have been adequately defined by lower federal courts and state courts. This Court's review of the matter is not appropriate under any of the standards applicable to a Petition for a Writ of Certiorari. (Rule 19)

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Harry H. Craig
7 North 7th Street, Suite 717
St. Louis, Missouri 63101
(314) 231-1018

Attorney for Respondents Other
Than Occidental Life Insurance
Company of California

Of Counsel:

NORMAN W. ARMBRUSTER
CLYDE E. CRAIG
WILEY, CRAIG, ARMBRUSTER, WILBURN & MILLS